

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SAN CLEMENTE BEACH
COUNTRY CLUB et al.,

Plaintiffs and Appellants,

v.

GOLDEN EAGLE INSURANCE
CORPORATION,

Defendant and Appellant.

G028815

(Super. Ct. No. 00CC05662)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Robert D. Monarch, Judge. Affirmed.

Bruce I. Cornblum for Appellants.

Hawkins, Schnabel, Lindahl & Beck, Kelley K. Beck and Jeffrey D.
Wolf for Respondent.

This is an action by San Clemente Beach Country Club and its investors¹ (collectively San Clemente) for a declaration of coverage and recovery of defense costs from its insurer, Golden Eagle Insurance Corporation. San Clemente appeals from summary judgment for Golden Eagle, arguing there was a duty to defend. We disagree and affirm.

* * *

San Clemente was sued by an adjoining landowner, James Bruneaux, after a portion of his backyard located on a hillside fell away. The land below belongs to the club, and Bruneaux believed it was responsible for the slide.

Bruneaux alleged that in February 1998 his property suffered a slope failure approximately 70 feet wide, 17 feet high and 5 feet deep. Three causes of action were set out – negligence, nuisance, and “injunction.” Bruneaux alleged San Clemente was negligent in grading the toe of the slope, which removed lateral support from his property and caused damages of \$75,000. The nuisance claim was that the removal of the lateral support created “a continuing threat to the health, safety, use and enjoyment of [Bruneaux’s] property” that would last until the support was restored. Bruneaux claimed he notified San Clemente of the damage caused “and the potential for future damage,” and he requested damages of \$75,000 and abatement of the nuisance. The third cause of action sought a mandatory injunction to compel the repair and restoration of the toe of the slope, along with the damaged hillside. Here, Bruneaux alleged removal of the toe of the slope posed a “continuing threat” to the use and enjoyment of his property, and

¹ The action was brought by San Clemente and several individuals who are alleged to be named insureds under the policies issued by Golden Eagle: Fon Leong, Ruth Leong, Wenche Huang, Patricia Huang, Wentien Huang, Kuei Hsiang Huang, Lucy Callahan, James Wu, and Susan Wu. The individuals appear to be the investors in a limited partnership and/or joint venture that operated the club.

there was a “threat of further slope failures” that “may” remove support for the foundation of his house.

San Clemente tendered defense of the action to Golden Eagle, its commercial general liability insurer. The Golden Eagle policy was issued on August 1, 1998, and renewed through July 6, 2000. It covers liability for property damage that occurs during the policy period. Property damage is defined as “[p]hysical injury to tangible property, including all resulting loss of use,” and the definition states that “[a]ll such loss of use shall be deemed to occur at the time of the physical injury that caused it.” There is also coverage against liability for personal injury. This includes “[t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies by or on behalf of its owner, landlord, or lessor.”

Golden Eagle denied coverage on the ground that the loss occurred in February 1998, prior to inception of coverage on August 1, 1998, so it was outside the policy term. The insurer also relied on a subsidence exclusion, which it said eliminated coverage because subsidence of the slope was the basis for Bruneaux’s claims.

This action followed. The complaint sets out causes of action for a declaration that there is coverage and a duty to defend, breach of contract, and breach of the implied covenant of good faith and fair dealing.

Several months after the complaint was filed, San Clemente sent Golden Eagle a demand for settlement. The letter revealed that the golf club had agreed to settle with Bruneaux for \$60,000 plus repair of the slope, and San Clemente asked Golden Eagle to pay 25 percent, along with its attorney fees. Attached correspondence from the club’s counsel indicated other insurance

companies paid \$59,500 toward the settlement, along with most of the club's attorney fees incurred in the defense.²

San Clemente argues the demand letter included new information establishing a potential for liability under the Golden Eagle policies: a report prepared by Bruneaux's engineers. Among other things, the engineers said the slope failure was due to loose fill and heavy rain. In a passage emphasized by San Clemente, the report said the fill materials "have gradually become less competent over time" as a result of the rainy season. The report concluded the slope failure resulted from the combination of this condition and grading by San Clemente. Nonetheless, Golden Eagle refused to contribute to the settlement.

Golden Eagle moved for summary judgment on the ground there was no coverage. San Clemente contended Bruneaux's complaint alleged a continuing injury with potential future damages, so there was a potential for damage during the policy period that triggered coverage. It also argued the subsidence exclusion was ambiguous, and should be interpreted in favor of coverage. The trial judge agreed with Golden Eagle and granted the motion.

I

San Clemente argues there was a duty to defend because the complaint alleges a continuing loss, which carried the potential for damage within the policy period. It finds this in the allegation of a continuing threat to Bruneaux's use and enjoyment of his land until the slope was restored, and the claimed loss of lateral support. The club contends these allegations "infer[] a continuous loss" and "support[] an implication of a loss extending over a period of time." But this is conjecture that does not impose a duty to defend.

² The record does not reveal the policies under which these insurers accepted coverage. Nor does it explain why San Clemente asked Golden Eagle to pay 25 percent when it was being indemnified for all but \$500 of the settlement, along with attorney fees.

The duty to defend exists when an insurer is aware of facts that show a potential for liability. These may be gleaned from the complaint, the insured, or other extrinsic evidence. And it is the facts that control, not the theory of liability set out in the complaint, since a complaint can be amended to assert new or different theories. (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276-277.) But potential liability has its limits. One is that it does not include postulating claims for which there is no factual support. As one court put it, “[a]n insured may not speculate about hypothetical, unpled third party claims in order to manufacture coverage” (*Ringler Associates, Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1184; accord, *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 538.) Here, there is only speculation, nothing more.

Reading the complaint fairly, it just does not allege anything that gives rise to potential liability covered by the policy. The only facts set out claim San Clemente improperly graded its property, removed the lateral support holding up Bruneaux’s hillside, and this caused a slope failure in February 1998. The “continuing threat” language alleges just that – a threat of damage, not the fact of it. The same is true of the alleged “potential for future damage” and “threat of further slope failures.” It is the potential for coverage under the *existing* facts that imposes a duty to defend, not the potential for future damage that, if it comes to pass, would be covered.

The club claims Bruneaux’s engineering report and his deposition testimony show it had potential liability, but we cannot see how. The report said the slope failure occurred because of loose fill and San Clemente’s grading. How this shows there was damage during the policy period is a mystery to us. San Clemente claims it sent Golden Eagle a copy of Bruneaux’s deposition, but none of its record citations bears out this assertion. In any event, the referenced

testimony hardly helps San Clemente. Bruneaux said he first noticed some slippage in December 1997, and he was concerned about erosion because the slope lacked proper vegetation. While this suggests part of the fault lay with Bruneaux, it does not show damage during the policy period.

San Clemente argues the event that triggers coverage can take place prior to the policy period where there is a continuing or progressive loss, relying on *Montrose Chemical Corp. v. Admiral Insurance Co.* (1995) 10 Cal.4th 645 and *Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448. It is right about the rule, but wrong that it applies here. Both cases are distinguishable, since the underlying complaint in each alleged property damage during the policy period. In *Montrose*, it was 27 deaths and property damage during the years Admiral's policies were in effect. (*Montrose Chemical Corp. v. Admiral Insurance Co.*, *supra*, 10 Cal.4th at p. 657.) In *Borg*, the damage was loss of use that continued through the filing of the suit, which took place during the policy period. (*Borg v. Transamerica Ins. Co.*, *supra*, 47 Cal.App.4th at pp. 457-458.) No such loss has been shown here.

San Clemente also contends there was a potential loss of use claim. It points to the allegation that Bruneaux was denied the use and enjoyment of his property, and argues this could have continued during the policy period. Unfortunately, the definition of property damage in the Golden Eagle policy makes it clear that any loss of use claim would not be covered in this case. The policy defines two types of property damage. One is "[p]hysical injury to tangible property, including all resulting loss of use of that property." Such loss of use shall be deemed to occur "at the time of the physical injury that caused it." The other type of property damage is "[l]oss of use of tangible property that is not physically injured," and here the loss is deemed to occur "at the time of the 'occurrence' that caused it." In this case, there was injury to Bruneaux's property.

So, for coverage purposes, any loss of use is treated as occurring in February 1998, when the slide took place and injured his property. Since that was prior to the policy period, there was no coverage or duty to defend.

Equally unavailing is San Clemente's argument there was a duty to defend because it was potentially liable for wrongful eviction. The club has misread the applicable policy provision. It was insured against liability for wrongfully evicting a tenant, not alleged here. There is coverage for liability for personal injury, defined to include "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises *that a person occupies by or on behalf of its owner, landlord or lessor.*" (Emphasis added.) Bruneaux did not allege the club interfered with his rights as a tenant, absent which the wrongful eviction coverage cannot apply.

Since there was no potential liability under the Golden Eagle policies, it did not have a duty to defend San Clemente. Summary judgment for the insurer was proper. We do not reach the issue of the applicability of the subsidence exclusion.

The judgment appealed from is affirmed. Respondent is entitled to costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.